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FILED
JAN 28 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1231

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES G. STRICKLAND, Warden,
Florida State Penitentiary,
LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, and
JIM SMITH, Attorney General,
State of Florida,

Petitioners,

vs.

AMOS LEE KING, JR.,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of
Appeals for the Eleventh Circuit

BRIEF OF PETITIONERS ON JURISDICTION

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QUESTION PRESENTED

WHETHER, DESPITE THE PREVIOUS GRANT OF CERTIORARI IN THIS CASE (NO. 83-1287) VACATING THE JUDGMENT OF THE COURT OF APPEALS AND REMANDING THE CAUSE FOR FURTHER CONSIDERATION IN LIGHT OF STRICKLAND V. WASHINGTON, 466 U.S. ___, (1984), THE COURT OF APPEALS PROPERLY APPLIED THE PRINCIPLES OF THAT CASE TO REINSTATE ITS ORIGINAL AND IDENTICAL JUDGEMENT?

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I

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at King v. Strickland, __F.2d__ (11th Cir. 1984) (Case No. 82,5306, opinion filed December 3, 1984. A101-112. That decision was on remand from an order of this court dated May 29, 1984, in Strickland v. King, Case No. 83-1287. The decision of the court of appeals containing the judgment which was vacated by the Writ of Certiorari is reported at King v. Strickland, 714 F.2d 1481 (11th Cir. 1983). A1-70 Other pertinent opinions are reported at King v. Strickland, Case No. 81-1092-T-WC., M.D. Fla; opinion issued February 10, 1982). A71-100; King v. State, 390 So.2d 315 (Fla. 1980), cert. denied., 450 U.S. 989 (1981) and King v. State, 407 So.2d 904 (Fla. 1981).

II

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit issued a decision on December 3, 1984, on remand from this Court, adhering to and reinstating the original panel opinion appearing at King v. Strickland, 714 F.2d 1481 (11th Cir. 1983).

The State then filed a motion to stay mandate order on December 6, 1984, pending the timely filing of this petition.

The jurisdiction of this Honorable Court is based on 28 U.S.C. §1254(1), inasmuch as the court of appeals reversed in part the district court's decision in a habeas corpus proceeding brought under 28 U.S.C. §2254.

III

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the Constitution of

the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, where district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV of the Constitution of the United States provides inter alia, that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. §2254(a) provides that:

> "The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

IV

STATEMENT OF THE CASE

The facts material to consideration of the question presented are identical to those appearing in our first petition in Case No. 83-1287 and accordingly, will not be needlessly repeated here. Insofar as a statement of the posture of this particular cause is concerned, Petitioner notes that on May 29, 1984, this Court granted our petition for writ of certiorari, vacated the judgment of the court of appeals on the ineffective assistance of counsel issue and

remanded the cause for further consideration in light of Strickland v. Washington, 466 U.S. ___, (1984).

On remand, the court of appeals, on December 3, 1984, reaffirmed its judgment on both issues and reinstated the original panel opinion. A101-112.

V

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the Court of first instance was a petition for writ of habeas corpus filed pursuant to Title 28, §2254 U.S.C.

VI

REASON FOR GRANTING THE WRIT

The best reasons for granting another writ of certiorari are the factors which motivated this Court to grant the writ previously on May 29, 1984, Case No. 83-1287. In fact, the motivation to review the judgment of the court of appeals is perhaps greater now than it was before. We say this because, in our view, the new judgment of the court of appeals seems to have been entered with little or no compliance with this Court's order.

The Eleventh Circuit treated Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 (1984), as something akin to an adivsory opinion, perfunctorily summarizing this Court's holding, echoing conclusory quotations from its earlier opinion, and adhering to its belief that Washington was unnecessary to determine that King was denied effective assistance

of counsel. In considering a decision of this Court which was rendered in response to the need for guidance on the issue, and directed to a decision of the Eleventh Cirucit Court of Appeals, that tribunal could only glean that Washington represented an identification of two components which make up a general ineffective assistance of counsel claim. "First, a defendant must show that counsel's performance was deficient by identifying specific acts and omissions." "Second, the defendant must show that the deficient conduct was prejudicial..." A 104-105 Regarding counsel's performance, the court of appeals did nothing more than reiterate its initial findings that King's attorney failed to present available character witnesses in mitigation and made a weak closing argument at the penalty stage of trial and accordingly concluded

that the first prong of this Court's test was satisfied.

As to the prejudice aspect, the court of appeals repeated its motion that nothing this court could do (or did) in Strickland v. Washington, would have any effect on its determination that regardless of the standard employeed, King suffered prejudice to a degree even greater than that comptemplated. It is interesting to note that in reading this conclusion, the court of appeals summarily refused to reexamine the factual findings which allegedly support a finding of ineffective assistance of counsel.

With all due respect to the court of appeals, it is your Petitioner's sincere belief that the above does not represent the proper function of a court of appeals when its judgment on a particular issue has been vacated and the cause sent back

for further consideration in light of a decision of this Court. Surely this Court intended more than to have a judgment it has vacated so easily revived by the process of repeated assertion.
The result should have been a judicial opinion reciting not only in what particulars the performance of counsel was unreasonable during the penalty phase of the trial, but also, and most importantly, identifying the prejudice that actually (not conceivably) ensued.

Consideration of Washington in light of the instant facts quickly shows that the court of appeals incorrectly decided the issue. This Court considered the benchmark for judging claims for ineffectiveness as whether the conduct of counsel "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as

having produced a just result." Strickland v. Washington, 104 S.Ct. at 2064. In order for a defendant to succeed on a claim of ineffectiveness of counsel so as to obtain a reversal of conviction or death sentence, this Court held that he must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. It is necessary to show that the errors, if any, were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. This Court rejected the notion that rigid guidelines are to be utilized when assessing such a claim and instead held that the measure of an attorney's performance should be predicated upon reasonableness under prevailing professional norms. The Court provided clear direction to lower state and federal courts requiring that judicial

scrutiny of counsel's performance must be highly deferential. The lower courts were clearly directed that every effort must be made to eliminate the distorting effects of hindsight and to try and reconstruct circumstances and evaluate conduct based on those circumstances as they existed at the time. Requirements were imposed that strong presumptions be afforded to the idea that counsel acted reasonably and thus effectively. Emphasis was placed on strategic choices made after thorough investigation and that those choices were virtually unchallengable, and a particular decision not to investigate must be assessed for reasonableness considering all the circumstances and applying a heavy measure of deference to the attorney's judgments.

Most importantly, it was stated that when a defendant challenges a death

sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In this context, to the extent that an appellate court independently reweighs the evidence, it too was bound by that process. "[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." 104 S.Ct. at 2069.

Even with the few principles mentioned above, It is at once seen that the court of appeals failed to properly apply them to the facts in this cause. As we stated in our earlier petition, the court of appeals concluded that ineffective assistance of counsel resulted

at the sentencing phase of the trial. This holding was predicated upon two conclusions. The first was that counsel did not do enough preparation for the penalty phase of the trial as he produced only one witness in mitigation on King's behalf. The second conclusion was that certain remarks of counsel during sentencing left King without an advocate to plead his case.

The court of appeals apparently depends on the notion that a substantial amount of mitigating evidence surrounds any capital defendant. If a lawyer does not discover and produce every shred of evidence, he is presumptively ineffective. The court of appeals conclusion that defense counsel failed to conduct exhaustive investigation into the preparation of cumulative character witnesses for the sentencing proceeding

has absolutely no support in the record. Defense counsel presented the testimony of King's minister that he was a good worker and a non-violent person (R 2028-2030). In addition, counsel referred to Phillip Carol's testimony that King had been one of the best workers he ever had (R 1318, 1321-1322, 3030). Finally, trial counsel informed the jury that Attorney David Kurland, who represented King on the charge for which he was placed at the Correctional Center, considered King to be a non-violent person (R 2031).

While Assistant Public Defender Rondolino said he checked Cole's files and found a list of six character witnesses who should have been called, his opinion was based on pure speculation and should have been rejected. First, Rondolino did not know what Cole did in the way of contacting these witnesses. Second,

Rondolino was never able to state that there were, in fact, any other witnesses available; if they would have testified; what they would have testified to; or whether their testimony would have been beneficial to King. Clearly, King did not meet his burden of persuasion in establishing that Counsel was ineffective and that his actions were outside the wide range of professionally competent assistance. This conclusion becomes even clearer when the two uncalled character witnesses' (Scott and Brown) testimony is examined. Scott and Brown who were called to testify at the 3.850 hearing, both stated that they were present at King's sentencing hearing at trial counsel's request. (See TR 236, 240-241). Cole was certainly aware of their existence, having subpoenaed them to Court, however, he chose not to have them testify for two

very good reasons.[1] First, their testimony would have been merely cumulative to what the jury heard. Second, Brown's testimony would have actually been prejudicial to King since he would have told the jury that he had heard that King had been involved in some break-ins and burglaries (TR 235). Counsel's decision not to present these witnesses was certainly a tactical decision. Counsel's conduct was not deficient.

There is also nothing in the instant record to support the court of appeal's earlier finding that defense counsel did not have sufficient time to prepare the sentencing portion of the trial. While Cole initially requested a night to relax,

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[1] The lawyer told Brown that he did not need him (TR 238). Both Brown and King stated that there were other people that would have come forward and testified on King's behalf, but they never said who these witnesses were (TR 237, 242-248).

moments later counsel informed the judge that he only needed thirty minutes to get him witnesses together (R 2016). The trial judge then granted a brief recess (R 2018), after which the sentencing hearing began.[2] Again, King has failed to show "that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment."

The court of appeals also considered the closing remarks of counsel at sentencing as demonstrating ineffective assistance of counsel. For something so dramatically apparent it is noteworthy that United States District Judge William Castagna also reviewed this issue and found the claim was clearly without merit.

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[2] It is important to note that it was the jury's decision to proceed with the penalty phase directly after completing the guilt phase of the trial. (R 2016).

Also, when the claim was initially presented to the Florida Supreme Court, a unanimous court did not consider meritorious to any degree the suggestion now made that trial counsel's closing argument represented a breach of his duty of loyalty to his client. The Eleventh Circuit's conclusion was based on one isolated portion of counsel's argument which has been taken totally out of context. There was absolutely nothing wrong with defense counsel's being candid with the jury. The jury had just convicted King of the perverted sexual attack upon a sixty-eight year old woman, stabbing her to death and then setting her house on fire to destroy the evidence. It surely cannot be said that this was not a horrible crime. To argue otherwise would surely have lessened counsel's credibility. Cole's argument can only be

reasonably construed as an attempt to get a life recommendation. Counsel simply wanted to assure the jury that although they found King guilty of first degree murder, he would not get work release or be freed if they would spare his life. This point was made to rebut the State Attorney's argument that King would soon be back on the streets (R 2031-2035). It should also be remembered that counsel's argument was directed to the jury, who only renders an advisory opinion as to the appropriate sentence. The ultimate decision is left to the trial judge.

In Strickland v. Washington, this Court required that a defendant must show that the ineffectiveness of counsel resulted in "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Here, the court of

appeals relieved King of showing any real prejudice whatsoever. In the court of appeal's opinion, it is suggested that additional mitigating evidence in the form of other witnesses existed and should have been presented; however, the court obviously chose not to examine the value of the evidence. This type of analysis appears to utilize the same kind of "conceivable benefit" test which was specifically rejected in Strickland v. Washington, supra. See also United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). Additionally, that notion appears to be clearly unsound when Willie Brown's testimony is examined. In addition to testifying what a fine fellow King was, he would have also added that Appellant had a reputation in the community for burglaries and break-ins. That particular point is

one which any competent attorney would have sought to keep away from the jury's knowledge and consideration.

In Strickland v. Washington, supra, this Court held that the reviewing court must ask whether the defendant has met the burden of showing that the decision reached would reasonably have been likely absent the errors. Id. at 701. The ultimate inquiry is aimed at the fundamental fairness of the proceedings. Id. at 702. Here, King did not demonstrate that counsel's performance was "outside the wide range of professionally competent assistance". Application of the new standard for ineffective assistance of counsel shows counsel's conduct was not deficient, and there is no reasonable probability that the results of this case would have been different but for any act of omission on counsel's part.

Finally, the determinaton displayed by the court of appeals in this particular case becomes both emphatic and questionable in light of two of its decisions rendered subsequent to this Court's order of remand.

In a non-capital case, Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984), in response to specific claims of demonstrated omissions on behalf of counsel, the court of appeals had no difficulty whatsoever in analyzing Washington and conclusively rejecting the notion that the omissions could have conceivably affected the outcome. Interestingly, the court skipped over the performance component and dealt solely with the prejudice aspect in reaching its decision.

Most recently in a capital case which ultimately resulted in execution of the

defendant, at issue was the alleged effect of certain remarks of the prosecutor made at the sentencing portion of trial. Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984). At a trial in which the defendant waived an advisory jury, the prosecutor made pointed and repeated requests for the penalty of death to be imposed and offered much in the line of philosophic, sympathetic, and moralistic exhortations in his attempt to persuade the trial judge to impose the penalty of death. That particular panel of the court of appeals found no indication that a capital sentencing judge in Florida could not cull out any improper considerations and disregard them. In this case, defense counsel's remarks were presumed improper and assumed as a matter of law and fact to have prejudiced King to death. We simply cannot reconcile the two conflicting

notions of the court.

In conclusion, the court of appeals, in almost a recalcitrant manner, continues to believe that King failed to receive constitutionally effective assistance of counsel. The very best the lower court has provided is a brief duplication of its judgment which gave rise to the grant of certiorari in the first place. Since there now exists more complusion to grant review, it is respectfully submitted that the Court should not only again grant the writ but this time, summarily reverse the Eleventh Cirucit Court of Appeals, vacate its judgment on this issue and direct that tribunal to affirm the district court in its denial of habeas corpus on this claim.

Perhaps the action of the court of appeals warrants the application of the general admonitory considerations found in

Hutto v. Davis, 454 U.S. 370 (1982).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MICHAEL J. KOTLER, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on the _____ day of January, 1985, I served one copy of the Petition for a Writ of Certiorari on Baya Harrison, 317 East Park Ave, Tallahassee, Florida 32301 by a duly addressed envelope with postage prepaid.

MICHAEL J. KOTLER
Assistant Attorney General

APPENDIX

AMOS LEE KING, JR.,

Petitioner-Appellant,

v.

CHARLES G. STRICKLAND, JR.,

Respondent-Appellee

No. 82-5306

United States Court of Appeals
Eleventh Circuit

September 2, 1983

State death row inmate, who was incarcerated on conviction of first-degree murder, petitioned for a writ of habeas corpus The United States District Court for the Middle District of Florida, William J. Castagna, J., denied petition, and petitioner appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) habeas petitioner had not met burden of establishing ineffective representation at guilt phase of trial; (2) lead

counsel's closing argument, in combination with counsel's failure to present available mitigating evidence, denied petitioner effective assistance of counsel at penalty stage of trial; (3) exclusion of venire member for cause was proper; (4) district court could properly decide issue of ineffectiveness without hearing; (5) consolidation of indicted and information charges did not, by itself, make trial fundamentally unfair; and (6) refusal to permit defense counsel to ask prospective jurors whether they favored mandatory death penalty for certain crimes did not deny petitionr a fair trial.

Affirmed in part, reversed in part and remanded.

1. CRIMINAL LAW 641.13(1)

Sixth Amendment guarantees criminal defendant the right to counsel reasonably

likely to render, and rendering, reasonably effective assistance. U.S.C.A. Const. Amend. 6.

2. CRIMINAL LAW 641.13(1)

In judging whether Sixth Amendment Standard of reasonably effective assistance of counsel has been met, totality of circumstances and entire record must be considered. U.S.C.A. Const. Amend. 6.

3. HABEAS CORPUS 85.2(2)

Burden is on habeas corpus petitioner to establish ineffectiveness of trial counsel and prejudice. 28 U.S.C.A. §2254; U.S.C.A. Const. Amend. 6.

4. CRIMINAL LAW 641.13(1)

Whether effective assistance of counsel has been afforded is mixed question of law and fact. U.S.C.A. Const. Amend. 6.

5. HABEAS CORPUS 85.1(2)

Historical or primary facts found by

state courts are entitled to presumption of correctness in habeas corpus proceeding in federal court. 28 U.S.C.A. §2254.

6. HABEAS CORPUS 25.1(6)

To establish prejudice flowing from any ineffectiveness of trial counsel, habeas corpus petitioner must demonstrate that counsel's ineffectiveness resulted in actual and substantial disadvantage to course of his defense, but need not show that this disadvantage determined outcome of entire case. 28 U.S.C.A. §2254; U.S.C.A. Const. Amend. 6.

7. HABEAS CORPUS 85.5(9)

Habeas petitionr had not met burden of establishing ineffective representation at guilt phase of trial, even if defense counsel did not anticipate consolidation of indicted charges with information charges, and notwithstanding testimony of

support counsel and another attorney, as well as statements by lead counsel himself, to effect that lead counsel was exhausted, where alleged deficiencies in counsel's preparation were not supported by record or law, petitioner did not represent that FBI agent, who stated on proffer that he found no hairs of negro origin in victim's pubic sample or in ambulance within which she had been wrapped, had in fact found nonnegroid hair, counsel got medical examiner to acknowledge that she could not determine whether paring knife found on petitioner's person caused victim's injury, and counsel emphasized in closing argument that victim's friend could not identify knife as belonging to victim. 28 U.S.C.A. §§2254, 2254(d); Const. Amend. 6; West's F.S.A.R. Cr.P. Rule 3.250.

8. CRIMINAL LAW. 641.13(2)

Counsel may be effective even if he spends only short period of time with his client prior to trial. U.S.C.A. Const. Amend 6.

9. HABEAS CORPUS 85.1(2)

Finding of Florida Supreme Court that defense counsel was ready to try indicted and information charges together was entitled to presumption of correctness by federal court on habeas corpus petition. 28 U.S.C.A. §2254; U.S.C.A. Const. Amend. 6.

10. CRIMINAL LAW. 641.13(2)

Even if lead counsel was extremely tired, such alone did not estalbish ineffectiveness; there ahd to be some showing he committed errors because of his condition. U.S.C.A. Const. Amend. 6.

11. CRIMINAL LAW 641.13(1)

A tired lawyer is not necessarily an

ineffective lawyer. U.S.C.A. Const. Amend. 6.

12. CRIMINAL LAW 641.13(6)

Decisions as to whether to call witnesses to stand and whether to ask particular questions must be viewed as tactical matters, for purpose of determining question of effective assistance. U.S.C.A. Const. Amend. 6.

13. CRIMINAL LAW 641.13(7)

Counsel's duty to his client extends beyond guilt stage of trial to sentencing proceedings. U.S.C.A. Const. Amend. 6.

14. CRIMINAL LAW 641.13(7)

Lead counsel's closing argument, in combination with counsel's failure to present available mitigating evidence, denied defendant effective assistance of counsel at penalty stage of trial where counsel unnecessarily stressed horror of crime and

counsel's status as appointed representative in closing argument and, in effect, separated himself from his client, conveying to jury that he had reluctantly represented a defendant who had committed a reprehensible crime. U.S.C.A. Const. Amend. 6.

15. CRIMINAL LAW 998(3)

Under Florida law, defendant's failure to raise challenge to imposition of death penalty on conviction under felony-murder rule precluded consideration of issue on motion for collateral relief. West's F.S.A. §782.04(1).

16. HABEAS CORPUS 45.3(1)

Failure to bring up issue on appeal, no less than at trial, may preclude federal habeas corpus review. 28 U.S.C.A. §2254.

17. HABEAS CORPUS 25.1(1)

Where habeas corpus petitioner proffered no justification for failure to raise challenge to imposition of death penalty on conviction under felony-murder rule on direct appeal and on appeal from denial of collateral relief motion, his unexcused procedural default prevented Court of Appeals from reaching merits of claim on habeas corpus review. 28 U.S.C.A. §2254; West's F.S.A. §782.04(1)

18. HABEAS CORPUS 25.1(8)

State death row inmate, who unsuccessfuly sought collateral relief in state court based on Florida Supreme Court's alleged use of nonrecord material in reviewing death sentences, and who lacked any specific evidence that Florida Supreme Court actually relied on nonrecord material in his case, was precluded from attacking Florida court's alleged practice

in federal court. 28 U.S.C.A. §2254.

19. JURY 83(1)

Venire member, who specifically stated that she could not be impartial as to guilt or innocence, rather than as to sentence, was properly excluded for cause.

20. HABEAS CORPUS 59

Habeas corpus petitioner is not entitled to hearing or ineffectiveness if state court record is sufficient. 28 U.S.C.A. §2254; U.S.C.A. Const. Amend. 6.

21. HABEAS CORPUS 59

Where state court had held evidentiary hearing on ineffectiveness claim at which two potential character witnesses who were not called at trial and two attorneys, including support counsel, had testified for defendant, and habeas petitioner did not suggest what additional evidence he hoped to develop before

district court, such court could properly decide ineffectiveness issue on petition for habeas corpus without a hearing. 28 U.S.C.A. §2254; U.S.C.A. Const. Amend. 6.

22. HABEAS CORPUS 90

Although it is often advisable for district court to provide brief explanation of its disposition of each claim on petition for habeas corpus, such practice is not required where court rejects claims which it regards as frivolous or totally without merit. 28 U.S.C.A. §2254.

23. HABEAS CORPUS 92(1)

Federal habeas court had to accept findings of state court, in denying defendant's motion to suppress at trial, as to credibility of defendant and arresting officers, just as any appellate court must accept findings of trial court where credibility choices are involved. 28 U.S.C.A. §2254.

24. CRIMINAL LAW 619

Consolidation of attempted murder and escape charges, arising out of incident involving prison counselor, with arson, robbery, involuntary sexual battery and murder charges, arising out of incident involving resident of house adjacent to correctional center, did not, by itself, make trial fundamentally unfair. U.S.C.A. Const. Amend. 6.

25. JURY 131(8)

Refusal to permit defense counsel to ask prospective jurors whether they favored a mandatory death penalty for certain crimes did not deny defendant a fair trial. U.S.C.A. Const. Amend. 6.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

RONEY, Circuit Judge:

Convicted of first degree murder and sentenced to death, Amos Lee King, Jr. appeals the federal district court's denial of his petition for a writ of habeas corpus. He raises a number of arguments as to both conviction and sentence. Although we affirm on all issues raised as to the conviction, we hold that counsel was ineffective during the penalty phase. We discuss King's other claims going to the validity of the sentence, as to which we find no error. As to these latter points, we affirm.

In March of 1977, King was an inmate at Tarpon Springs Community Correctional Center, a minimum security work release facility, where he was serving a sentence

for larceny of a firearm. On March 17 he worked at a Clearwater restaurant from 5:00 p.m. until 1:00 a.m. the following morning. An inmate van picked him up at around 1:30 am., and he checked back into the facility at approximately 2:35 a.m. At about 3:40 a.m., the prison counselor, James McDonough, discovered King missing during a routine bed check. McDonough found King outside the building with blood on his pants. After McDonough escorted King back into the facility, a fight broke out between the two in which King repeatedly stabbed McDonough with a knife. King then fled the facility.

In the meantime a fire had broken out at a house approximately 1,500 feet from the correctional center. Police arrived at around 4:05 a.m. and discovered the dead body of Natalie Brady. She had

received numerous injuries, including two stab wounds, bruises, and a ragged tear of the vagina which apparently had been caused by blood-stained knitting needles found at the scene. There was evidence of forced sexual intercourse. Arson investigators concluded the fire had been set intentionally sometime between 3:00 and 3:30 a.m.

King voluntarily turned himself in that afternoon. He was indicted for the first degree murder of Natalie Brady, arson, robbery of her home, and involuntary sexual battery. He also was separately charged in a direct information with the attempted murder of McDonough and escape from prison. Over the objection of King's counsel, the indictment and information offenses were consolidated into one case for trial.

The government presented strong circumstantial evidence of King's guilt on the murder charge. The medical examiner who performed an autopsy on the deceased, for example, testified that King's blood type was present in Brady's vaginal washings. She stated that if Brady's assailant had raped her with his pants on after causing the tear to the wall of her vagina, blood would have been present on the clothing, as McDonough had found on the crotch area of King's pants. She testified the paring knife used by King to assault McDonough was "consistent" with the wounds found on Brady, but she admitted she could not say this knife caused the wound. A knife salesman testified that the paring knife was manufactured by the same company and was similar in design to the other kitchen knives found in

Brady's house. An old friend of the deceased testified that the paring knife resembled one Brady kept in her house.

The jury found King guilty of all the offenses alleged, including the first degree murder charge, and recommended the death penalty, which the trial court imposed. The Florida Supreme Court affirmed the convictions and death sentence, King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981). The Florida courts also denied collateral relief after an evidentiary hearing. King v. State, 407 So.2d 904 (Fla. 1981). The United States District Court for the Middle District of Florida then denied King's petition for federal habeas corpus relief in an unpublished opinion, but issued a certificate of probable cause to appeal. This appeal

ensued.

Ineffective Assistance of Counsel

In order to understand the basis on which we hold counsel to have been ineffective at the penalty stage of the trial, it is helpful to discuss petitioner's arguments as to the guilt phase.

[1 - 3] The sixth amendment guarantees a criminal defendant the right to counsel reasonably likely to render, and rendering, reasonably effective assistance. Baty v. Balkcom, 661 F.2d 391, 394 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Washington v. Estelle, 648 F.2d 276, 278 - 79 (5th Cir.), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981). In judging whether this standard has been met, the totality of circumstances and the entire record must be

considered. Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982), cert. denied, __U.S.__, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983); Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981). The burden is on the habeas corpus petitioner to establish ineffectiveness and prejudice. Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, __ U.S. __, 103 S.Ct. 2451, 76 L.Ed.2d __ (1983).

[4, 5] Whether effective assistance has been afforded is a mixed question of law and fact. Cuyler v. Sullivan, 446 U.S. 335, 341 - 42, 100 S.Ct. 1708, 1714 - 15, 64 L.Ed.2d 333 (1980); Harris v. Oliver, 645 F.2d 327, 330, n. 3 (5th Cir.), cert. denied, 454 U.S. 1109, 102 S.Ct. 687, 70 L.Ed.2d 650 (1981). Therefore this Court has held that a state

court's determination of constitutionally effective assistance is not entitled to a presumption of correctness under 28 U.S.C.A. §2254(d), and that the federal district court's determination is not protected by the clearly erroneous standard of review on appeal. Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982). Of course, the historical or primary facts found by the stae courts are entitled to a presumption of correctness in a 28 U.S.C.A. §2254 proceeding in federal court. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); Mason v. Balcom, 531 F.2d 717, 721 - 22 (5th Cir. 1976).

King was represented by two attorneys from the local public defender's office, Thomas Cole and Anthony Rondolino. Cole, now deceased, was lead counsel, with

Rondolino joining the case one week before trial. Although both attorneys were experienced in criminal defense work, neither had handled a death case before.

At the outset, we note that unlike most of the ineffectiveness cases that come before us in this case two competent attorneys testified at an evidentiary hearing before the state trial court on the motion for collateral relief that King's counsel was not adequate to afford the defendant a fair trial. The state produced no testimony to the contrary. The two testifying attorneys were support counsel Rondolino and Pat Doherty, a Florida defense attorney experienced in death cases. The state judge, who had presided at King's trial, allowed Doherty to proffer his testimony, but ruled it inadmissible because Doherty's standard for judging ineffectiveness did not comport with that of the Florida Supreme

Court, as enunciated in Knight v. State, 394 So.2d 997 (Fla. 1981). The Florida Supreme Court did consider Doherty's proffered testimony, however, King v. State, 407 So.2d at 905, and therefore we do also, without relying on this Circuit's rejection of the Knight standard. Washington v. Strickland, 693 F.2d 1243, 1267 n.10 (5th Cir. Unit B 1982) (en banc), cert. granted, __ U.S. __, 103 S.Ct. 2451, 76 L.Ed.2d __(1983). Doherty's testimony, like Rondolino's, is part of the record on appeal.

Guilt Stage

The picture of lead counsel Cole painted by Rondolino and Doherty is of a skilled crimnal attorney who for a variety of reasons, some of which were beyond his control, was not ready to proceed to trial. Doherty, who was a friend of

Cole's and was at the time of trial in the same Public Defender's office as Cole, testified, for example, that Cole was exhausted during the trial. Cole had been working on a separate criminal case involving a defendant named Scott. The Scott case ended in acquittal 11 days before King's trial began. Doherty testified as to the effect of the Scott case on preparation for King's defense.

> . . . Mr. Cole fervently believed in this person's [Scott's] innocence, this man protested his innocence at every turn in the road. This was probably the biggest case Tom Cole ever had as a criminal lawyer. He worried about it day and night and it was in that set of circumstances that the Amos Lee King case was being prepared, if it was being prepared.
>
> In other words, what I am saying to you, at every turn in the road, Amos King's case was being overshadowed by the Scott case. It was a consuming interest of Mr. Cole.

Rondolino, who resided with Cole at the time, confirmed Doherty's account of Cole's engulfing involvement in the Scott case. The trial record reveals Cole's stating on one occasion, "Judge, I am beat, I have got to go home and get some sleep", and stating on another occasion, "I can't think any more." One tangible example of how the Scott case seems to have adversely affected Cole's preparation for the King case is the course of defense depositions of government witnesses. Most of the depositions were taken between the first Scott trial, which resulted in a mistrial, and the second. At least 26 were taken in one day and 11 on another. Other depositions were not taken until after King's trial had begun.

Rondolino described another adverse factor in the preparation for the trial.

Four days before trial, the Florida Rules of Criminal Procedure were amended to permit the state to move for consolidation. On the morning of the scheduled trial in both cases, the state made such a motion, which the court granted over defense counsel's objection. Rondolino and Cole told the trial judge they were prepared to proceed with either case that day, but not with both together. Cole stated, "Judge, as an officer of the court, I cannot give Amos King a fair trial today or this week." The defense, which had received two previous continuances, asked for another, which the court denied.

Rondolino indicated at trial and at the subsequent hearing that the consolidation without a continuance threw defense strategy out of whack. At trial he stated:

> . . . since I have been working with Mr. Cole in this case, it has been the consensus of our opinion that we were going to proceed one at a time on these cases. Mr. Cole and I had planned the cases in that light, and it puts a totally different face on the case when both of them are consolidated. For instance, tactics as far as introduction of evidence, objections to be made in regard to testimony of witnesses about the surrounding facts, what we plan to present, just numerous, numerous things, Judge, and if we are going to be forced to go ahead and go to trial this week on a consolidated case, we are just not prepared, Judge, for the record . . ..

He elaborated at the collateral relief hearing, explaining that the defense attorneys felt they could present a viable defense to the indicted charges involving the Brady incident without presenting any affirmative defense by simply pointing out holes in the government's case, but that this "beyond a reasonable doubt" strategy became unviable when the charges involving

the McDonough incident were consolidated.

There are some indications in the record, however, that defense counsel may have foreseen the possibility of a consolidation. In direct conflict with the statements of defense counsel, a state attorney represented to the trial judge that, in his frequent conversations with the defense attorneys, they indicated they planned on a consolidated trial. The judge recalled that two weeks before trial when defense counsel obtained a continuance "it was represented to me . . . that all of the cases were going to be tried at one time." On appeal, the Florida Supreme Court found that defense counsel "was prepared to try all offenses on the trial date." King v. State, 390 So.2d at 318.

At trial, Cole suggested another difficulty counsel experienced in preparing

for trial. Cole and Rondolino moved to withdraw as counsel, with Cole stating:

> . . . the defendant, Mr. King, does not have confidence or is not satisified with the representation that I have made in his behalf, and I feel that because of his lack of confidence that he has in me, that I cannot effectively communicate with him to prepare adequately to represent him today, and would renew my motion to withdraw at this time . . .

King, who also testified at the evidentiary hearing, stated that Cole met with him only twice prior to trial. Cole told the trial judge at a pretrial hearing, however, that he had spoken with his client four or five time.

A number of failures by counsel during the trial raise some question as to ineffectiveness. Cole, for example, failed to bring up on cross-examination the weakness in the testimony of a key government witness. Alma Tarpley, the

deceased's old friend, testified that she had seen a knife similar to that used by King in the attack on McDonough in Brady's kitchen on Anclote Road. Earlier testimony revealed that Brady had lived on a different street since around 1960. Thus defense counsel could have called attention to the fact that Tarpley had not seen the knife she claimed to be similar for about fifteen years. Cole did not cross-examine Tarpley, but he did stress in closing argument that Tarpley could not identify the knife as belonging to Brady.

Similarly, Cole failed to challenge, as scientifically plausible, the statement by the medical examiner, Joan Wood, that the paring knife used by King to attack the guard and allegedly Brady was "consistent" with Brady's wounds. Cole got Wood to acknowledge on cross-examination,

however, that she could not determine this particular type of knife caused the injury, and he emphasized this point in closing argument. Testifying at the hearing that he had never heard any witness imply a knife could be matched to a wound, Doherty stated Cole could have further destroyed Wood's testimony.

Perhaps more significantly, counsel failed to present a piece of potentially exculpatory evidence. An FBI agent, Robert Neill, had examined a sample of Brady's pubic hair, her nightgown and the ambulance sheets within which she had been wrapped. He testified briefly on direct to establish a chain in the custody of certain exhibits, but when Cole began cross-examining him about his findings, the court sustained an objection to the questions as beyond the scope of direct.

On proffer, he stated he found no hairs of negro origin in the pubic sample or in the sheets. He found a dark human hair fragment on the nightgown but could not identify it as to race. Cole did not call Neill on direct, even after learning this information.

The lower state court which held the evidentiary hearing did not reject, as establishing historical facts, any of the evidence presented by King. Since the evidence was uncontradicted, it can be assumed the court simply determined, as a matter of law, that these facts and the trial record did not demonstrate counsel was ineffective. The state judge, who had preside at King's trial, stated immediately upon the close of the evidence at the collateral attack hearing:

> The motion that has been filed by the Defendant, that being the

> 3.850 motion, is denied, the Court having found, based upon having heard the testimony, presided over the trial, observed counsel for the Defendant during the trial, having had the opportunity of Mr. Cole as part of this record here today, reasonably prior to this trial, not immediately prior but reasonably prior, having had the opportunity of receiving an acquittal for his client after a prior mistrial in a very horrendous murder an I certainly do not argue with the jury's verdict. But for the purposes of these comments are just to advise you and your client is that even based upon what I have heard here today, and based upon the law of this state as I understand it to be, that there has not been shown that your client was ineffectively represented by counsel.
>
> To the contrary, again based upon not only what I heard during the trial, but what I heard here today, I think that the record would conclusively show that the Defendant is entitled to no relief.

The law of Florida relied upon by the trial court was undoubtedly that set forth in the leading Florida ineffectiveness

case, Knight v. State, 394 So.2d 997 (Fla. 1981), which had been decided some ten months before the state collateral hearing.

The Supreme Court of Florida, performing its review function, likewise did not reject any of the facts presented at the state hearing. Accepting all of the evidence, including Doherty's testimony, the court also applied the Knight standard:

> The trial judge found that Cole provided effective assistance of counsel. Our review of the evidence fails to disclose otherwise. We fail to find any single act of omission of commission, or any series or combination thereof, that was a substantial and serious deficiency measurably below that of competent counsel. Even if Doherty's testimony to the contrary is accepted, no act, or combination of acts, was substantial enough to demonstrate prejudice to the defendant to the extent that there is a likelihood that any substandard conduct affected the outcome of the

> court proceedings. See Knight v. State, 394 So.2d 997 (Fla. 1981).

407 So.2d at 905

From the district court's opinion and order, it appears that it also analyzed specific allegations concerning the omissions and conduct of counsel in terms of the likelihood that they affected the outcome of the proceedings. The district court said: "nowhere does it appear that to have undertaken to act as the Petitioner now claims his trial counsel should have acted would have changed the verdict or the sentence."

[6] After these courts had decided this case, this Circuit rejected the Knight standard so that ineffectiveness, or more precisely the prejudice flowing from any ineffectiveness, must be measured under the test enunciated in Washington v.

Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, __ U.S. __, 103 S.Ct. 2451, 76 L.Ed.2d __ (1983). Under that test, the habeas corpus petitioner must demonstrate that counsel's ineffectiveness "resulted in actual and substantial disadvantage to the course of his defense" but need not show that this "disadvantage determined the outcome of the entire case." 693 F.2d at 1262.

[7] Even under this less stringent standard, however, King is not entitled to relief. The alleged deficiencies in counsel's preparation are supported neither by a close reading of the record nor by the law. For example, the record does not substantiate King's argument that Cole never deposed a few key government witnesses. Support counsel testified that he records of the public defender's office

showed no transcribed depositions for nine government witnesses but he acknowledged that depositions are often not transcribed. He could not say for sure, and there is no other probative evidence, that a single government witness had not been deposed. In fact, it is evident from the record that depositions were taken from at least the vast majority of potential government witnesses. Although some of the depostions were taken after trial commenced, Doherty testified that he had done the same thing in some cases and that this practice is not a fatal defect in a murder trial.

Similarly unavailing is King's claim that Cole's preparation suffered because of his consuming involvement in the Scott case. The trial in that case ended eleven days before the King trial began. The

only tangible evidence suggesting the Scott case adversely affected the representation of King is that many of the depostions in the King case were taken during a two-day period between the first Scott trial, which ended in a mistrial, and the second. King does not suggest any beneficial facts Cole would have learned if he had taken the depositions in a less rushed manner.

[8] Neither the law nor the record substantiates King's claim that he met with counsel only twice prior to trial. Cole told the trial judge he had spoken with his client on four or five occasions, and, even if King's testimony is credited, counsel may be efective even if he spends only a short period of time with his client. Jones v. Wainwright, 604 F.2d 414, 416 - 17 (5th Cir. 1979); Howard v.

Beto, 466 F.2d 1356, 1357 (5th Cir. 1972), cert. denied, 410 U.S. 956, 93 S.Ct. 1428, 35 L.Ed.2d 689 (1973).

[9] There are two problems with King's assertion that counsel was not prepared to try together the indicated charges of murder, robbery, arson and involuntary sexual battery with the information charges of attempted murder and escape. First, the trial judge, who was in a far better position to know the truth than this Court, evidently believed defense counsel had foreseen a consolidation. He indicated the parties had told him the charges would be tried together. The Florida Supreme Court viewed the record similarly, stating that the charges had been treated together in pretrial proceedings. That court's finding that defense counsel was ready to try all the charges

together is entitled to a presumption of correctness. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

Second, the Florida Supreme Court, the final arbiter of state law, stated that the evidence of the attempted murder and escape would have been admissible in a separate trial of only the indictment offenses. King v. State, 390 So.2d at 318. Thus, even if defense counsel did not anticipate consolidation, it is hard to see how this lack of forresight prejudiced King.

[10, 11] The testimony of Randolino and Doherty that Cole was exhausted and the statements by Cole himself to that effect during trial certainly give us some pause. But even if Cole was extremely tired, this alone does not establish ineffectiveness. There must be some showing

he committed errors because of his condition. A tired lawyer is not necessarily an ineffective lawyer.

King essentially points to three supposed errors by counsel during trial: the failure to call FBI agen Neill on direct, and the failure to do more to refute the testimony of two government witnesses, Tarpley and Wood. Neill's testimony would have been of substantial benefit to King only if he had found a non-Negroid hair, not belonging to the victim, in the material he examined. Brady was undoubtedly sexually assaulted and murdered. The only question at trial was whether King was the perpetrator of the crimes. The absence of any hair of any racial origin simply would not have been probative of whether a black man was the guilty party.

Cole did not ask Neill whether he had

found a non-Negroid hair, perhaps because Cole knew the answer from the FBI report which he apparently had. King does not represent to us that Neill had in fact found a non-Negroid hair. Thus King has not established that the failure to call Neill caused King to lose any valuable testimony.

[12] With respect to Wood, the medical examiner who testified that the paring knife was "consistent" with the wounds found on the victim, it cannot be assumed that Cole could have obtained an expert witness to refute Wood's testimony. Even if counsel could have found a rebuttal witness, by presenting the testimony he would have lost the right to both the first and last closing arguments. Fla. R. Crim. P. 3.250. In any event, Cole got Wood to acknowledge on cross-examination

that she could not determine this particular knife caused the injury, and he stressed this point in closing argument. Especially given these circumstances, decisions as to whether to call witnesses to the stand and whether to ask particular questions must be viewed as tactical matter. United States v. Rubin, 433 F.2d 442, 445 (5th Cir. 1970), cert. denied, 401 U.S. 945, 91 S.Ct. 961, 28 L.Ed.2d 228 (1971).

As to Tarpley, the deceased's friend who testified that the knife allegedly used by King resembled one of Brady's, Cole emphasized in closing argument that Tarpley could not identify the knife as belonging to Brady. Thus, once again, Cole did remove much, if not all, of the sting from the government witness' testimony.

In short, King has not met his burden to establish ineffective representation at the guilt phase of the trial.

Penalty Stage

[13] Counsel's duty to his client extends beyond the guilt stage of the trial to the sentencing proceeding. Stanley v. Zant, 697 F.2d 955, 963 (11th Cir. 1983). King argues that lead counsel Cole was ineffective at the penalty phase of the trial because he failed to present available character witnesses and made a weak closing argument.

There are indications in the record that counsel failed to conduct an exhaustive investigation for potential mitigating evidence. Prior to the penalty stage, Cole told the trial judge he had not discussed this part of the trial with his client and asked for a one-day continuance

so he could speak to possible defense witnesses. The court denied the request. Although King apparently furnished his lawyer with a list of six possible character witnesses, there is no indication he contacted all of them to determine whether their testimony might be helpful.

Nonetheless, Cole did present some mitigating evidence on behalf of his client. Cole called one character witness, a minister and former employer of King in the gardening business, who testified that King was a good worker whom he never knew to be violent during the twenty years they were acquainted. Cole also called the jury's attention to the testimony during the guilt phase of the trial of two witnesses: King's employer at the restaurant, who described the defendant as

an excellent employee, and the head of the correctional center, who termed the defendant a good inmate without disciplinary problems. In addition, Cole informed the jury of a converstaion he had had with King's former attorney, who indicated he viewed the defendant as unintelligent and uneducated, but not violent.

In support of his claim that Cole should have presented additional mitigating evidence, King called two long-term acquaintances at the state post-conviction relief hearing. Both witnesses stated they had attended the trial, apparently at the requst of defense counsel, but had not been called to testify. They indicated that if called they would have confirmed that King was a good, non-violent person and a trustworthy employee. One of the acquaintances acknowledged, however, that

King had a reputation for burglaries. He indicated many other people would have testified on defendant's behalf if they had been asked. Support counsel testified at the hearing that additional character witnesses should have been called.

Although Cole presented some mitigating evidence, it is clear that counsel neglected to present other avialable evidence. The record also suggests this failure cannot be deemed a strategic decision taken after a reasonable investigation into the alternatives. This Court has emphasized the importance of pretrial preparation and investigation. See Washington v. Strickland, 693 F.2d 1243, (5th Cir. Unit B 1982) (en banc), cert. granted, __ U.S. __, 103 S.Ct. 2451, 76 L.Ed.2d __ (1983); Goodwin v. Balkcom, 684 F.2d at 804 - 05, cert. denied, __U.S.__,

103 S.Ct. 1798, 76 L.Ed.2d 364 (1983); Rummel v. Estelle, 590 F.2d 103, 104 - 05 (5th Cir. 1979). Here, counsel admitted he was unprepared for the penalty stage of the trial, because he had not adequately discussed sentencing with his client nor had he carefully searched for mitigating evidence.

These errors occurred at a particularly critical point in the trial.

> The sentencing stage of any case, regardless of the potential punishment, is "the time at which for many defendants the most important services of the entire proceeding can be performed." ABA Standards on the Administration of Criminal Justice, Sentencing Alternatives and Procedures §5.3(e). The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial.

Stanley v. Zant, 697 F.2d at 963.

Although this Court apparently has never

held counsel ineffective in a capital case solely because of failure to present mitigating evidence, see id. at 964, it has on a number of occasions cited this failure as one factor sugesting ineffectiveness. See Young v. Zant, 677 F.2d 792, 799 (11th Cir. 1982); Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981); Mason v. Balcom, 531 F.2d 717, 724 (5th Cir. 1976).

As in those cases, counsel here did not merely neglect to present available mitigating evidence. He made a closing argument that may have done more harm than good. In his argument, the main thrust of which was that the defendant if given life would be secured in prison for many years. King's attorney unnecessarily stressed the horror of the crime and counsel's status as an appointed representative:

"It is extremely difficult for me to talk to you at this time. This is the first time that I have ever been in a position like this. I have been practicing law for three years now, Assistant Public Defender and I have never defended a murder case before. I think that you all understand that the job I had to do this week and you can appreciate what I had to do.

You can convict Amos of a cruel and evil crime. There is no doubt about it. Murder upsets me very much and I am also human, I have feelings, I have been to Raiford which is the State Prison.

Now you might not think that Amos deserves to live in our society of civilized people. You might not consider him right now as a human being and what you convicted him of was an evil and gross crime but I am not asking you to put him back out on the streets or take a chance that he will ever be back out there because in Florida the legislature passed a law which means that when you convicted a man of first degree murder if you don't if he is not sent to the elecric chair, then he automatically goes to prison for life and for twenty years he is not eligible for parole. He is not eligible for parole. He will be in

> maximum security at Raiford, not a work release center."

In effect, counsel separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime. "[R]eminding a jury that the undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused." Goodwin v. Balkcom, 684 F.2d at 806, cert. denied, __ U.S. __, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983). Rather than attempting to humanize King, counsel in his closing argument stressed the inhumanity of the crime.

[14] We hold that this argument in combination with counsel's failure to present available mitigating evidence denied King effective assistance of counsel at the penalty stage of the trial.

Death Penalty Based on Felony Murder

[15 - 17] King argues he could not be constitutinally sentenced to death because he was convicted under the Florida felony murder rule, which does not require a showing of intent to kill. Fla. Stat. Ann. §782.04(1). King did not raise this point to the Florida Supreme Court on direct appeal. Under Florida law, this procedural default precluded consideration of the issue on a motion for collateral relief. Hargrave v. State, 396 So.2d 1127 (Fla. 1981). Although King mentioned the point in his motion for post-conviction relief, he did not raise it on appeal from the denial of the collateral relief motion and the Florida Surpeme Court did not discuss the question. The failure to bring up an issue on appeal, no less than at trial, may preclude federal habeas corpus

review. Ford v. Strickland, 696 F.2d 804 at 816 - 17, petition for cert. filed, [No. 82-6923] (U.S. June 14, 1983); Huffman v. Wainwright, 651 F.2d 347 (5th Cir. 1981); Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977). King has proffered no justification for not raising the point, so his unexcused procedural default prevents us from reaching the merits of his claim, but it is worth noting that in a similar set of facts we rejected this argument on its merits. Adams v. Wainwright, 709 F.2d 1443, 1446 - 47 (11th Cir. 1983).

Non-Record Material Before the Florida Supreme Court (The Brown Issue)

[18] King was one of the Florida death row inmates who unsuccessfully sought collateral relief in state court based on the Florida Supreme Court's alleged use of non-record material in reviewing death sentences. Brown v.

Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). His attack in federal court on the Florida court's alleged practice is foreclosed by Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), petition for cert. filed, June 14, 1983 No. 82-6923. King lacks any specific evidence that the Florida Supreme Court actually relied on non-record material in his case.

Restriction on Jury's Consideration of Mitigating Circumstances

Because our decision requires that King be resentenced, we do not need to consider the argument that the trial court's instruction limited the jury's consideration to statutory mitigating circumstances, in violation of Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Removal of Prospective Juror Who Opposed the Death Penalty: The Witherspoon Issue

King argues that the trial court violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), by excusing for cause venire member Holenda. In Witherspoon, the Supreme Court held that veniremen cannot be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id. at 522, 88 S.Ct. 1777. The Court carefully admonished, however:

> . . . that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who make unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the

> trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt . . ..

Id. at 522 n. 21, 88 S.Ct. at 1777 n. 21 (emphasis in original); accord Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980).

[19] A careful review of the colloquy between the trial judge and venire member Holenda reveals that the second basis for exclusion provided in Witherspoon and Adams applies here: the prospective juror could not be impartial in deciding the defendant's guilt. Because the questions asked of Holenda referred back to questions asked of the last two prospective jurors, the colloquy involving all three must be reviewed.

THE COURT: Again I will direct this question to each of those of you who have just

entered the box: As you are aware, one of the charges against this defendant carries a possible punishment of death in the electric chair. Do any of you have any conscientiously held opinions as to the death penalty that would prevent you from reaching a verdict?

* * * * * *

THE COURT: Mr. Farmer?

VENIREMAN FARMER: Yes, sir.

THE COURT: In other words, you do not feel that you could reach a verdict--

VENIREMAN FARMER: Yes, sir. I do not believe in capital punishment.

THE COURT: Well, that's not the--really the question.

VENIREMAN FARMER: Well, if I were to go on and it would be a part of the verdict that gave an advisory for you for death, I could not be a part of it.

THE COURT: Well, here--let me back up a little bit. As to the capital offense, the only--your function there would be to determine whether in fact he was guilty or innocent of the charge. That would be number one, if it would be, and

my question then was, could you find a verdict based upon the testimony and the law as to his guilt or innocence.

VENIREMAN FARMER: Not knowing that the possibility was there, sir, that it would mean death.

THE COURT: All right, sir. You may step down then, Mr. Farmer.

* * * * * *

Frank Carter.

THE COURT: Okay. Now what about possible penalty that could be imposed? Do you have any conscientiously held opinion with respect to capital punishment that would prevent you from reaching a verdict?

VENIREMAN CARTER: No, your Honor.

THE COURT: In other words, Mr. Farmer just candidly indicated to the Court that he could never vote--that he could never reach a verdict with respect to an offense such as this. Do you feel that you could reach a verdict based upon the law and evidence?

VENIREMAN CARTER: Yes, sir.

THE COURT: Do you have any reason at this time that you could not serve fairly and impartially?

VENIREMAN CARTER: Not to my knowledge.

THE COURT: Mr. Holenda and Mrs. King, did I ask you these questions also with respect to the penalty?

VENIREWOMAN HOLENDA: You didn't ask. I'm sorry, I don't believe that I could be impartial. I'm against capital punishment.

THE COURT: Well, here again, as I indicated to Mr. Farmer, even though you are against capital punishment, the jury itself would not be imposing the same. You would be asked to reach a verdict based upon the testimony, the evidence, and the law based as to his guilt or innocence as to each of the charges, and then as to the punishment as it relates to capital punishment. You would then be asked to vote to advise the Court as to what they jury feels would be the proper punishment . I would not be bound by your opinion, however.

VENIREWOMAN HOLENDA: I understand, but I do feel strongly about it. I'm sorry, but that's exactly how I feel.

THE COURT: Okay. You may step down.

Venire member Holenda specifically stated she could not be impartial, and viewing the colloquy involving all three jurors, it is clear that the question related to her verdict as to the guilt or

innocence, not her recommendation as to sentence. Accordingly, her exclusion was proper.

Denial of Evidentiary Hearing on Ineffective and Summary Rejection of Issues Other Than Ineffectiveness

King faults the district court for deciding the ineffectieness issue without first affording him an evidentiary hearing. Because of our decision as to ineffectiveness at the penalty phase of the trial, it is unnecessary to discuss King's argument that the district court should have held a hearing on ineffectiveness during the penalty stage.

[20, 21] As to King's claim that an evidentiary hearing should have been held regarding ineffectiveness at the guilt phase of the trial, we would not reverse the district court. In his opinion denying the writ, the district judge noted

that defense counsel had told him a hearing was unnecessary before he ruled on King's motion to stay the judgment. Without deciding whether this amounted to a waiver which extended to a decision on the habeas corpus petition, a habeas corpus petitioner is not entitled to a hearing on ineffectiveness if the state court record is sufficient. Winfrey v. Maggio, 664 F.2d 550, 551 - 52 (5th Cir. 1981). Here a state court had held an evidentiary hearing on the ineffectiveness claim at which two potential character witnesses who were not called at trial and two attorneys, including support counsel, had testified for the defendant. King did not suggest what additional evidence he hoped to develop before the district court. The court could properly decide the issue without a hearing.

[22] King also claims the district court should have explained its reasons for rejecting each of his claims, rather than summarily dismissing all except ineffectiveness as "without merit". Although it is often advisable for the district court to provide a brief explanation of its disposition of each claim, this practice is not required where the court "reject[s] claims which it regards as frivolous or totally without merit." Washington v Strickland, 693 F.2d 1243, 1264 n. 34 (5th Cir. Unit B 1982) (en banc), cert. granted, __ U.S. __, 103 S.Ct. 2451, 76 L.Ed.2d __ (1983) (quoting Sumner v. Mata, 449 U.S. 539, 548, 101 S.Ct. 764, 769, 66 L.Ed.2d 722 (1981)). We have reviewed each claim and, for the reasons set forth in this opinion, affirm the denial of relief based on issues other

than ineffectiveness.

Admission of Statements Made by King

Denying King's motion to suppress, the trial court permitted a police officer to testify about the statements made by King after his arrest and receipt of Miranda warnings, including two conflicting statements concerning how he obtained the knife used to attack McDonough. First he told the arresting officers that the knife was his and he had possessed it for weeks. Later he told the officers that it was McDonough's knife which he had taken from McDonough after the prison official had attacked him. King testified at the motion to suppress that he had asked for a lawyer before any questionsing. The police officers gave contrary testimony, indicating that King had not asked for a lawyer until after he had made the

statements about the knife.

The trial court evidently believed the police officers, not King. It excluded only statements made after the time the officers testified King first requested an attorney, expressly finding that all prior statements were freely and voluntarily given.

[23] The federal court must accept the findings of the state court as to the credibility of King and the officers, just as any appellate court must accept the findings of a trial court where credibility choices are involved. See United States v. Kreczmer, 636 F.2d 108, 110 (5th Cir. 1981) (credibility choices on motion to suppress are within province of finder of fact); United States v. Howard, 451 F.2d 1003, 1004 (5th Cir. 1971) (credibility choice involving conflicting evidence

evidence as to whether police agent gave defendant Miranda warnings is for the trial judge).

Consolidation

[24] King contends the consolidation of the attempted murder and escape charges, arising out of the incident involving prison counselor McDonough, with the arson, robbery, involuntary sexual battery and murder charges, arising out of the incident involving Brady, denied him a fair trial. In concluding that consolidation was proper under state law, the Florida Supreme Court indicated the evidence of the prison incident would have been admissible at the murder trial even without consolidation. King v. State, 390 So.2d at 318. The Florida court also found that defense counsel was prepared to try all charges on the trial date. Id.

This finding of fact is entitled to a presumption of correctness under 28 U.S.C.A. §2254(d); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), and the Florida Supreme Court is the ultimate source of state law. Ford v. Strickland, 696 F.2d at 810, petition for cert. filed June 14, 1983, No. 826923. The consolidation hardly caused the defendant great prejudice. It certainly, by itself, did not make the trial fundamentally unfair.

Restriction on Defense Questioning During Voir Dire

[25] Sustaining the prosecutor's objection, the trial judge refused to permit defense counsel to ask prospective jurors whether they favored a mandatory death penalty for certain crimes. The Florida Supreme Court succinctly explained why this question was irrelevant:

> The purpose of voir dire examination is to obtain a fair and impartial jury to try the issues in the cause . . . The subject question, however, did not address the juror[s]'s impartial application of existing law, but rather it concerned [their] conception of what laws should exist.

King v. State, 390 So.2d at 319. All of the jurors who were eventually selected indicated they could reach a decision based on the law and evidence. The restriction on voir dire questioning did not deny King a fair trial.

The denial of the petition for habeas corpus relief is affirmed, insofar as it attacks the constitutionality of the conviction, but reversed as to the death penalty. The case is remanded to the district court for entry of an appropriate writ.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5603

AMOS LEE KING, JR.,

Petitioner-Appellant,

versus

CHARLES G. STRICKLAND, JR., Warden, FLORIDA STATE PENITENTIARY, LOUIE L. WAINWRIGHT AND JIM SMITH, Attorney General,

Respondents-Appellees.

- - - - - - - - - - -

Appeal from the United States District for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 9/2/83, 11 Cir. 198_, ____F.2d ____)

(NOVEMBER 4, 1983)

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(XXX) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Reharing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY

REHG-6
(Rev. 6/82)

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5306

D.C. Docket No. 81-01092

AMOS LEE KING, JR.

Petitioner-Appellant,

versus

CHARLES G. STRICKLAND, JR., Warden, Florida State Penitentiary, LOUIS L. WAINWRIGHT, and JIM SMITH, Attorney General,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United

States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED IN PART and REVERSED IN PART, and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court.

September 2, 1982

REISSUED AS MANDATE:

ISSUED AS MANDATE: NOV 16, 1983

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMOS LEE KING, JR.,

Petitioner,

vs. Case No.81-1092
Civ.-T-WC

CHARLES G. STRICKLAND, JR., Warden, Florida State Penitentiary; LOUIE L. WAINWRIGHT, Secretary, Department of Corrections; and JIM SMITH, Attorney General, State of Florida,

Respondents.

OPINION AND ORDER

The Petitioner, Amos Lee King, seeks a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254.

Amos Lee King was convicted of the murder of Natalie Brady and of the offense of attempted first-degree murder, escape, robbery, involuntary sexual battery and arson. Upon the jury recommendation, the

trial judge imposed the death sentence for the first-degree murder conviction. The Florida Supreme Court affirmed the convictions and the impos tion of the death sentence.* King v. State, 390 So. 2d 315 (Fla. 1980). The Petitioner's petition for writ of certiorari was denied by the United States Supreme Court, King v. Florida, 450 U.S. 989 (1981), as was his request for clemency presented to the Governor and Cabinet of the State of Florida.

On October 9, 1981, the Petitioner filed a Motion for Post-Conviction Relief pursuant to Fla.R.Crim.P. 3.850 in the Sixth Judicial Circuit in and for Pinellas

* The sentence imposed for the involuntary sexual battery was vacated and the cause was remanded for resentencing for the offense of attempted first degree murder.

County, Florida. On November 4, 1981, the Honorable Robert Graham, Governor of the State of Florida, signed a death warrant authorizing the execution of the Petitioner for some time between December 4, 1981, and Noon, December 11, 181. The Petitioner's execution was ultimately scheduled for December 8, 1981.

An evidentiary hearing was held pursuant to the Petitioner's 3.850 Motion for Post-Conviction Relief on November 13, 1981. Upon consideration of the testimony presented therein, the trial court denied the motion. On that same day, the Petitioner filed a Notice of Appeal to the Florida Supreme Court, which set the case for oral argument on December 1, 1981.

On November 27, 181, the Petitioner filed a Petition for Writ of Habeas Corpus, Application for Stay of Execution

and a Motion for Leave to Proceed in Forma Pauperis in this Court. Hearing on the application was held on December 3, 1981, prior to which time the Florida Supreme Court affirmed the trial court's denial of the 3.850 motion and denied the Application for Stay of Execution. King v. State of Florida, ___So.2d___ (No. 61,406 Fla. Dec. 2, 1981). On December 4, 1981, this Court entered an Order granting the Motion to Proceed in Forma Pauperis and stayed the Petitioner's execution pending review of the record. After careful review of the entire record, Habeas Corpus relief is denied.

SUMMARY OF FACTS:

At the time the offenses of which the Petitioner was convicted occurred, he was an inmate of the Tarpon Springs Community Correctional Center, a work release facility, serving a sentence for larceny of a

firearm. At approximately 3:40 a.am. on the morning of March 18, 1977, prison counselor James McDonough made a routine bed check and found the Petitioner King absent from his room. Upon searching the building grounds, McDonough found King outside the building. When King came forward into the light, McDonough noticed that the crotch portion of King's light colored pants was covered with blood. The counselor escorted King back to the central room, and when he turned to get handcuffs, King attacked him with a knife. The two struggled and McDonough received over twenty cuts and stab sounds. King left, then returned and attacked McDonough again.

At approximately 4:05 a.m. police and fire personnel arrived at the scene of a fire at the home of Natalie Brady, whose

house was situated approximately 1500 feet from the correctional facility. Natalie Brady was found dead on the back porch.

It appeared that the victim had sustained two stab wounds, various bruises to the chin, and burns on the leg. An autopsy revealed further injuries, including bruises to the back of the head, hemorrhaging of the brain and neck, and broken cartilage in the neck. In addition, there was a severe tear of the vaginal wall, apparently caused by a wooden bloodstained knitting needle found at the scene. There was evidence of forcible intercourse. The Petitioner's blood type was found to be present in the victim's vaginal washings. The County Medical Examiner established the time of death at approximately 3:00 a.m. The arson investigators concluded that the fire was intentionally set some

time between 3:00 and 3:30 a.m.

The grand jury returned an indictment charging King with the first-degree murder of Natalie Brady, arson and robbery. The state attorney filed a direct information charging King with escape and the attempted murder of James McDonough. Both the indictment and information offenses were set for trial on July 5, 1977. The defense would not agree to consolidation. The State initially chose to proceed on the information offenses, but shortly before trial, on the basis of newly amended Fla.R.Crim.P. 3.151, the State moved to consolidate. The motion was granted.

The jury found the Petitioner guilty of all offenses charged and recommended the death sentence for the first-degree murder of Natalie Brady. The trial judge immediately imposed the death sentence.

Petitioner asserts the following claims as a basis for habeas corpus relief:

1. Denial of effective assistance of counsel.
2. Receipt by the Florida Supreme Court of psychiatric and psychological information concerning petitioner which was not presented at trial.
3. The alleged arson did not involve great risk of death to many persons as required to comprise an aggravating circumstance for jury consideration.
4. The jury was instructed only as to statutory mitigating circumstances.
5. Defense counsel was unduly limited in jury voir dire.

6. Jurors were improperly excused.

7. Consolidation for trial of two cases against defendant resulted in prejudice to defendant's right to a fair trial.

8. Violation of defendant's right not to be compelled to incriminate himself.

9. Death sentence was illegal because it was predicated upon the "felony murder" rule.

Defense counsel argued at the argument on the motion to stay the execution, that the record as it then stood was a sufficient basis for the Court to rule on defendant's contention and therefore an evidentiary hearing was neither required nor held. See Winfrey v. Maggio, 664 F.2d 550 (5th Cir. 1981).

This Court has reviewed the record in the light of 28 U.S.C. §2254(d) and Sumner v. Mata, ___U.S.___, 101 S.Ct. 764 (1981), and finds Petitioner's claims two through eight to have been fully and completely presented to either the trial or appellate courts of Florida. Claim number nine was not raised. This Court has again reviewed those claims as well as claim number nine and finds them to be without merit and not needful of further discussion.

The Petitioner's claim of ineffective assistance of counsel was heard by the state trial court at an evidentiary hearing by way of a motion for post-conviction relief filed pursuant to Fla. R. Crim. P. 3.850. The trial court found the Defendant to have had effective assistance of counsel at trial and denied the motion.

The Florida Supreme Court affirmed the trial court's denial.

This claim of ineffective assistance of counsel was the principal ground argued by the Petitioner at the hearing on the application for stay of execution and the ground upon which this Court found it necessary to examine the totality of the circumstances by review of the entire record in order to make an assessment as to whether or not effective assistance of counsel was rendered. See, e.g., Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981); Washington v Estelle, 648 F.2d 276 (5th Cir. 1981); Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980).

Factual determinations made by state courts which are presumed to be correct pursuant to 28 U.S.C. §2254(d) do not include mixed questions of law and fact.

Townsend v. Sain, 372 U.S. 293 (1963); Mason v. Balcom, 531 F.1d 717 (5th Cir. 1976). The resolution of the issue of effective assistance of counsel presents a mixed question of law and fact. Washington v. Watkinn, 655 F.2d 1355 (5th Cir. 1981); Harris v. Oliver, 645 F.2d 127 (5h Cir. 1981); Mason v. Balcom, supra. Consequently, it is clear that this Court may not simply adopt the conclusions of the Florida courts that the Petitioner received effective assistance of counsel because as the Fifth Circuit Court of Appeals has stated:

> Regardless of the thoroughness of state fact finding procedures, considerations of comity do not obligate federal courts in habeas corpus cases to defer to state determinations on matters of federal law. The obligation of the federal judge is the opposite; to apply the proper federal constitutional standards based on the underlying facts, although the conclusions drawn from the facts may

> differ from the state court's conclusions. (citations omitted).

West v. State of Louisiana, 478 F.2d 1026, 1031-32 (5th Cir. 1973), vacated in part and afirmed in part, 510 F.2d 363 (5th Cir. 1975) (en banc). Therefore, although an evidentiary hearing was not necessary, the Court nevertheless has reviewed the instances of alleged incompetence raised by the Petitioner in the light of the entire record and aplied the appropriate federal standards accordingly.

The Sixth Amendment guarantees an accused in a criminal proceeding representation by counsel reasonably likely to render and rendering reasonably effective assistance. Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981); Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981); Beavers v. Balkcom, 616 F.2d 114 (5th Cir. 1981); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), modified, 289 F.2d 728 (5th Cir.

3 1961), cert. denied, 368 U.S. 677 (1961). Effective counsel is neither errorless counsel, nor counsel judged ineffective by hindsight. Baty v. Balkcom, supra; Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980); Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). Accordingly, the appropriate standard for determining whether an accused was denied his right to effective assistance of counsel requires an inquiry in the actual performance of counsel conducting the defense, based on the totality of the circumstances and the entire record. Baty v. Balkcom, supra; Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981); Nelson v. Estelle, supra; Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980).

The Petitioner was represented at trial by assistant public defender Thomas

Cole, now deceased. Approximately one week prior to trial, assistant public defender Anthony Rondolino joined Cole in representing the Petitioner. The Petitioner argues that neither attorney had worked on a capital case prior to their association with his case. This fact is certainly not controlling as to the Petitioner's claim of incompetence and is minimized by the fact that each attorney had several years of trial experience in the representation of criminal defendants. See United States v. Kelly, 559 F.2d 399 (5th Cir. 1977).

The Petitioner contends that his trial counsel was ineffective because he consulted with Petitioner only two times prior to trial. The record, however, indicates that Thomas Cole told the trial judge at a motion hearing held shortly before the trial that he consulted with

his client four or five times. Despite the contradiction on the record, effective assistance of counsel can be rendered even if counsel spends oly a short time with his client. Jones v. Wainwright, 604 F.2d 414 (5th Cir. 1979); see Howard v. Beto, 466 F.2d 1356 (5th Cir. 1972), cert. denied, 410 U.S. 956 (1973).

The Petitioner contends that no effort "whatsoever" was made by counsel prior to trial to study, verify or refute any of the State's evidence linking the Petitioner to the murder of Natalie Brady. This contention is simply not supported by the record, and constitutes pure speculation on the part of the Petitioner.

The Petitioner notes instances during trial where his counsel could have refuted the testimony of various witnesses if he

had prepared properly. Specifically, one of Natalie Brady's neighbors who testified on direct examination that the paring knife in evidence was similar to ones used by the victim when canning vegetables was not cross-examined by trial counsel. The Petitioner speculates that because trial counsel was ill prepared for the witness' testimony, he failed to bring to the attention of the jury that the witness had seen such a knife in Natalie Brady's kitchen some fifteen years ago. Similarly, the Petitioner points to the uncontroverted testimony of a cutlery salesman that the subject paring knife was similar to ones found in Natalie Brady's kitchen. Furthermore, the Petitioner suggests that by retaining the assistance of an expert, trial counsel could have easily refuted the testimony of the assistant county

medical examiner that the wounds on the deceased's body were consistent with the subject paring knife.

These instances, either viewed individually or collectively, fall far short of demonstrating ineffective assistance of counsel. Where a claim of ineffective assistance of counsel is based on specific omissions of counsel, such as the failure to investigate potentially mitigating circumstances, the Petitioner must make a showing of prejudice before a finding of inefectiveness is appropriate. See Lovett v. State of Florida, 627 F.2d 706 (5th Cir 1980); Bucklew v. United States, 575 F.2d 515; see also Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980).

No prejudice is either urged or evident with regard to the alleged omissions of counsel for nowhere does it appear that to have undertaken to act as the Petitioner now claims his trial counsel should have acted would have changed the verdict or the sentence. Optimistic projections as to what answers unasked questions would have elicited or as to what results different trial strategy would have produced do not constitute a sufficient basis for a finding of ineffectiveness of counsel. Furthermore, "[t]he decisions as to whether or not to call witnesses to the stand, whether to ask or refrain from asking questions, and the like are tactical determinations. Errors, even egregious ones, in this respect do not provide a basis for post-conviction

relief." United States v. Rubin, 433 F.2d 442 (5th Cir. 1970), cert. denied, 401 U.S. 945 (1971). In examining the Petitioner's claim of ineffective assistance of counsel, this Court "decline[d] to evaluate the propriety of trial counsel's actions with the aid of the refractive correction of hindsight." Jones v. Estelle, 632 F.2d 490 (5th Cir. 1981); cert. denied, ___ U.S. ___, 101 S.Ct. 1992 (19811; quoted in Winfrey v. Maggio, 664 F.2d 550, 552 5th Cir. 1981). The proper method of examining trial strategy is to review counsel's actual performance based on the totality of the circumstances on the record.

A review of the trial transcript indicates that in his closing argument to the jury, counsel not only addressed the

circumstantial nature of the State's case against the Petitioner, but also made appropriate and specific reference to the alleged weaknesses in the testimony of the three aforementioned witnesses. Specifically, trial counsel noted that while Natalie Brady's neighbor did indicate that the victim had a knife similar to the one in evidence, she could not and did not absolutely identify the subject knife as belonging to Natalie Brady. While the knife in evidence was similar in make to ones found in Natalie Brady's kitchen, trial counsel pointed out that the cutlery salesman did not testify that the knives were part of a set. Moreover, although the medical examiner testified that the wounds on the victim were consistent with the blade of the knife in evidence, trial

counsel observed that she also admitted on direct examination that a blade from two to three inches could have made the same wounds. While trial counsel could have called expert witnesses to testify, it is arguable whether they would have contributed any more to the Petitioner's defense. There was no reason to call experts to the stand especially if by doing so trial counsel would have forefeited the Petitioner's right to both first and last closing arguments pursuant to Fla.R. Crim. P. 3.250. The tactical decision to offer no testimony in order to gain the right to final closing argument cannot be deemed ineffective assistance of counsel. Conyers v. Wainwright, 309 F. Supp. 1101 (S.D. Fla. 1970).

The Petitioner further contends that his trial counsel was ineffective because he failed to call FBI agent Robert Neill to the stand to testify to certain allegedly excuplatory evidence. The Petitioner predicates this conclusion on the fact that Agent Neill testified, outside the presence of the jury, that no identifiable negroid hairs were found on either the victim or the sheets in which the body was wrapped and on the likely probability that hairs from the attacker would be found on the victim. The Petitioner fails to note, however, that if Agent Neill would have been called as a defense witness he would have also testified that no identifiable caucasian hairs were found on either the victim's body or the sheets, leaving the allegedly exculpatory testimony without

any evidentiary significance. In addition, Agent Neill would have testified that a dark human hair was found on the victim's nightgown which could have been of negroid origin. It can hardly be urged then that the decision to keep that testimony from the jury was improper. On the contrary, for trial counsel to have put Agent Neill on the stand knowing that he would have so testified on cross-examination would have elicited an equally as intensive claim of ineffective assistance of counsel.

The Petitioner contends that trial counsel failed to depose several of the State's witnesses prior to trial. Anthony Rondolino testified at the 3.850 evidentiary hearing that not only was the Public Defender's file not complete as to all

depositions actually taken, but that some of the depositions taken were not transcribed. The Petitioner can only theorize as to the truth of his contention, and the Court cannot make a finding of ineffectiveness based on mere supposition.

The Petitioner further contends that trial counsel did not depose three State witnesses until after the trial had commenced. However, the Petitioner's expert witness, attorney Patrick Doherty, who testified at the 3.850 evidentiary hearing, did not consider it to be a fatal defect in a first degree murder defense not to take a deposition of an expert witness until after commencement of the trial. The Court finds no incompetency in this aspect of the defense.

The Petitioner claims his trial counsel had access to at least six character witnesses, only one of whom actually testified on the Petitioner's behalf during the penalty phase of the trial. With respect to trial counsel's failure to call additional character witnesses, the Petitioner has failed to demonstrate that anything more would have been gained by putting those witnesses on the stand during the sentencing phase of the trial. "Complaints concerning uncalled witnesses impose a heavy showing since the presentation of testimonial evidence is a matter of trial strategy and often allegations of what a witness would have testified to are largely speculative." United States v. Guerra, 628 F.2d 410, 413 (5th Cir. 1980). At the 3.850 evidentiary hearing, the

Petitioner called only two of the aforementioned witnesses to testify as to their willingness and ability to testify at the trial; however, it appears that neither uncalled witness would have contributed any additional or beneficial testimony on the Petitioner's behalf. In fact, one witness testified that he would have testified to the Petitioner's reputation in the community for break-ins. As to the remaining four witnesses, no one knows what they would have testified to. Trial counsel's failure to put on these additional witnesses is not an indication of ineffectiveness.

The Petitioner buttresses his claims of ineffectiveness by contending that Thomas Cole's involvement in another felony case rendered him physically and

emotionally exhausted, and therefore, trial counsel was unable to adequately defend the Petitioner. In suport, the Petitioner places much weight on the fact that shortly before trial, Cole declared that he was unable to give the Petitioner a fair trial. Obviously this Court cannot make a finding of ineffectiveness based on counsel's pretrial statement, without some substantial objective evidence to support it. That urged by Petitioner is insufficient. The Florida Supreme Court, in finding no error in the trial court's granting of the consolidation motion, also found that trial counsel was, in fact, prepared to try all offenses on the scheculed trial date. King v. State, 390 So.2d 115, 117-118 (Fla. 1980.

In the present case, the record of the state trial court proceedings indicates that attorneys Cole and Rondolino rendered effective assistance by 1) appropriate pretrial preparation, 2) actively participating in voir dire examination, 3) cross-examining the State's witnesses in a manner favorable to their apparent trial strategy, and 4) making meaningful and timely objections. In his closing argument to the jury, trial counsel Cole effectively addressed the circumstantial nature of the State's case against the Petitioner. Therefore, based upon the totality of the circumstances and the entire record, the Court finds that trial counsel's assistance was more than reasonably effective, and that accordingly the Petition for Habeas Corpus relief must be denied.

DONE AND ORDERED at Tampa, Florida this 1st day of February, 1982.

/s/ William Castagna
UNITED STATES DISTRICT JUDGE

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Amos Lee KING, Jr.,
Petitioner-Appellant,

v.

Charles G. STRICKLAND, Jr., Warden, Florida State Penetentiary, Louis L. Wainwright, and Jim Smith, Attorney General, Respondents-Appellees.

No. 82-5306.

United States Court of Appeals, Eleventh Circuit.

Dec. 3, 1984

Appeal from the United States District Court for the Middle District of Florida. ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

Roney, Circuit Judge:

Amos Lee King, Jr. was convicted of first degree murder and sentenced to death in Florida. After state procedures were completed, the federal district court

subsequently denied his petition for a writ of habeas corpus. We affirmed the district court on all issues related to the conviction but reversed the failure to grant relief as to the death sentence on the ground that counsel was ineffective during the penalty phase. The case was remanded for entry of an appropriate writ that would lead to resentencing. King v. Strickland, 714 F.2d 1481 (11th Cir. 1983). The Supreme Court, ___U.S.___, 104 S.Ct. 2651, 81 L.Ed.2d 358, vacated our judgment and remanded for further consideration in light of its decision in Strickland v. Washington, ___U.S.___, 104, S.Ct. 2052, 80 L.Ed.2d 674 (1984). Having applied the principles announced in Washington, we adhere to our earlier decision.

The facts are more fully set forth in our previous opinion. 714 F.2d at 1484.

King was convicted of the first degree murder of Natalie Brady, robbery of her home, arson, involuntary sexual battery, attempted murder of a prison counselor and escape from prison. The Florida Supreme Court affirmed a death sentence, King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981). The state courts denied collateral relief. King v. State, 407 So.2d 904 (Fla. 1981).

The question before us is whether the Supreme Court's holding in Strickland v. Washington requires a decision that King received effective assistance of counsel at his sentencing. The Court has considered the supplemental briefs of the parties on the point.

[1-3] Counsel's failure to render adequate legal assistance can deprive a criminal defendant of the Sixth Amendment

right to counsel. Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A claim of ineffectiveness must establish that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id, __ U.S.___ at ___ _ ____, 104 S.Ct. at 2063-65, 80 L.Ed.2d at 692-93. A capital sentencing hearing is sufficiently similar to a trial to require the same protection for the defendant. Id. at ___, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

The Washington Court held that a claim of ineffective assistance of counsel has two components. First, a defendant must show that counsel's performance was deficient by identifying specific acts and omissions. Counsel's conduct, viewed as of the time of the actions taken, must

have fallen outside of a wide range of reasonable professional assistance. In assessing a right to counsel's claim, an attorney's actions are strongly presumed to have fallen within that range, and a court must examine counsel's conduct without the use of judicial hindsight. [4] Second, the defendant must show that the deficient performance was prejudicial. The Washington Court followed a standard that requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at ___, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. A defendant challenging a death sentence must show that without the error there is a reasonable probability that "the balance of aggravating and mitigating

circumstances did not warrant death." Id. A defendant's failure to establish either the performance or the prejudice component results in denial of his Sixth Amendment claim.

In applying the standards of Washington, we note that they differ little from the standards applied in our initial decision in this case. We recognized that King had the burden of establihsing both ineffectiveness and prejudice, that the proper standard for attorney performance is that of "reasonably effective assistance," that the totality of the circumstances should be reviewed, that specific acts and omissions of counsel must be identified, and that strategic decisions made by counsel after a reasonable investigation into the alternatives deserve deference. Nevertheless, we concluded that King's

attorney's failure to present available character witnesses in mitigation and his weak closing argument constituted both an unreasonable professional performance by the attorney and impermissible prejudice to King, thereby denying him effective assistance of counsel at the penalty state of his trial.

The totality of the circumstances of this case differs markedly from that in Washington. Washington involved questioning the performance of an experienced criminal lawyer, but King's attorney at the capital sentencing, Thomas Cole, had never tried a capital case before and was unassisted during the penalty phase. Counsel and defendant in Washington had discussed the defendant's background in preparaton for the sentencing hearing, but Cole admitted that he had had no such discussion with his

client nor had he searched carefully for mitigating evidence. Counsel in Washington made the strategic choice to argue that his client was under severe emotional distress and to rely on his client's expression of remorse before a judge who had a tendency to be more lenient toward remorseful defendants. This Court determined that the record reflects Cole's failure to present additional available character witnesses as mitigating evidence was not a strategic decision taken after reasonable investigation.

Washington was a case of clear guilt based on confessions and pleas of guilt to three capital murder charges. King was convicted on circumstantial evidence which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough

to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made. In closing argument at the sentencing hearing, counsel in Washington tried to humanize his client by emphasizing his remorse and acceptance of his responsibility, his lack of a previous criminal history, and the presence of extreme mental or emotional disturbance at the time the crimes were committed. Cole's closing argument served only to dehumanize his client. Cole's emphasis on the reprehensible nature of the crime and indications that he had reluctantly represented the defendant were delivered in a manner that probably caused his client more harm than good. In Washington, there was no testimony in the record to support the claim of counsel's deficiency. King presented two

experienced criminal lawyers who supported his claim that Cole's performance was inadequate. In sum, a comparison of the totality of the circumstances in Washington with that in the case before us reflects two very differenct levels of professional conduct.

The State's supplemental argument suggests that we should reconsider matters fully addressed in our prior opinion. We have already determined that Cole's failure to present other mitigting evidence "cannot be deemed a strategic decision taken after a reasonable investigation into the alternatives." 714 F.2d at 1490. We have already decided that Cole's closing argument "unnecessarily stressed the horror of the crime and counsel's status as an appointed representative" Id. at 1491. The reconsideration on remand from the Supreme

Court requires us to apply the legal standard set in Washington, not to conduct another review of the facts of this case. [5] We conclude that King has satisfied both the performance and the prejudice prongs of the Washington standard. The two specific deficiencies in Cole's conduct at the sentencing hearing both fell outside the range of reasonable professional assistance. Cole's attempt to separate himself from his client in closing argument represents a breach of his duty of loyalty to his client stressed by the Supreme Court. Washington, ___U.S. __ at ___, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. King has established that Cole' errors were prejudicial to his defense. Circumstantial evidence cases are always better candidates for penalty leniency than direct evidence convictions. Cf.

Washington, at ___, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.") There is a sufficient probability that effective counsel could have convinced a sentencer that a death sentence should not be given to undermine confidence in the outcome. Resentencing is constitutionally required.

Upon reconsideration in light of Washington v. Strickland, the district court's denial of the petition for habeas corpus relief is reversed as to the death penalty. The prior opinion of this Court is reinstated. The case is remanded to the district court for entry of an appropriate writ.

AFFIRMED in PART, REVERSED in PART and REMANDED.